Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

SUSAN L. RICHARDSON,

Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

Petition For A Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress intend for South Dakota's legislative definition of "interest" to define the federal term "interest" in Section 30 of the National Bank Act 12 U.S.C. § 85 ("§ 85"), and thereby displace other states' laws limiting the form or the amount of liquidated damages for late payments on revolving credit accounts?

2. May Congress constitutionally delegate to South Dakota the power to define the federal lending term "interest" for all fifty states so as to preempt other states' consumer protection and contract laws?

3. As a matter of federal law, does the term "interest at the rate" in § 85 include contingent, sum-certain penalty charges (late fees) so as to preempt state limitations on the form or the amount of contractual penalties on revolving credit accounts?

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Susan L. Richardson ("petitioner" or "cardholder") respectfully petitions for a writ of certiorari to review the judgment entered below by the Colorado Supreme Court. The judgment is one of several decisions rendered by three state supreme courts on the very same federal issues within the last several months. The California Supreme Court decided the issue in ***Smiley v. Citibank (South Dakota), N.A.***, 11 Cal. 4th 138, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (1995), *cert. granted*, 116 S.Ct. 806 (1996), and the New Jersey Supreme Court decided the issue in ***Sherman v. Citibank (South Dakota), N.A.***, 143 N.J. 35, 668 A.2d 1036 (1995), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995).[1] Both the decision below and

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[1] There are three additional petitions pending in this Court raising identical questions. In ***Harris v. Chase Manhattan Bank, N.A.***, 30 Cal. App. 4th 130, 35 Cal. Rptr. 2d 733, *review granted*, 38 Cal. Rptr. 2d 346, 889 P.2d 540 (Cal. 1995), *appeal dismissed*, 46 Cal. Rptr. 2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (U.S. filed Dec. 18, 1995), the California Court of Appeal held that California contract provisions limiting liquidated damages are preempted by the word "interest" in § 85. The California Supreme Court dismissed the appeal in ***Harris*** after issuing its decision in ***Smiley***. A petition for certiorari was filed in this Court on December 18, 1995. In ***Copeland v. MBNA America, N.A.***, 907 P.2d 87 (Colo. 1995) *petition for cert. pending*, No. 95-1056 (U.S. filed Dec. 28, 1995), the Colorado Supreme Court held that the law of a bank's home state, in that case Delaware, provides the definition of "interest" in § 85 and therefore, Colorado's prohibition of late charges on revolving credit accounts held by Colorado consumers was preempted. In ***Hunter v. Greenwood Trust Co.***, 143 N.J. 97, 668 A.2d 1067 (1995), *petition for cert. pending*, No. 95-963 (U.S. filed Dec. 18, 1995), a companion case to ***Sherman***, the New Jersey Supreme Court followed its holding in ***Sherman***. ***Hunter*** raises the same issues except that it concerns credit card late fees charged by federally insured state banks pursuant to section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d ("§ 521"), modeled after § 85. Additionally, a petition for certiorari is

the opinion in *Smiley* directly conflict with the New Jersey Supreme Court's holding in *Sherman*. Given the conflicts and the number of petitions pending, the need for review is urgent.

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. 1-5) is published at 908 P.2d 532 (Colo. 1995). The Order of the District Court, City and County of Denver, Colorado (App. 9-22) is unreported.

JURISDICTION

The Colorado Supreme Court entered its judgment (App. 1-5) on December 18, 1995. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 1 of the United States Constitution directs, in pertinent part, that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1.

The Supremacy Clause provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

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being filed in *Stoorman v. Greenwood Trust Co.*, 908 P.2d 133 (Colo. 1995). *Stoorman* also concerns credit card late fees charged pursuant to § 521 of the DIDA.

The Full Faith and Credit Clause requires, in relevant part, that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. Const. art. IV, § 1.

Section 30 of the National Bank Act, as codified at 12 U.S.C. § 85, provides, in pertinent part:

> Any [national bank] may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, . . . where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. . . .

12 U.S.C. § 85 (1994).

Prior to codification, Section 30 of the National Bank Act also provided what is now codified, in relevant part, in 12 U.S.C. § 86 (1994):

> The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of the title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid . . . may recover back, in an action in the nature of an action on debt, twice the amount of the interest thus paid. . . .

When this litigation began, the Colorado Uniform Consumer Credit Code ("UCCC"), Colo. Rev. Stat. § 5-3-203 (1992) stated, in pertinent part:

> (5) (a) Except as provided in paragraph (b) of this section (5), with respect to a consumer loan, refinancing, or consolidation which is not pre-computed, including a revolving loan account, the parties may contract for a delinquency charge on any installment not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the installment or ten dollars; except that the provisions of this paragraph 1 (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.[2]

Section 54-3-1 of the South Dakota Codified Laws states as follows:

> Interest is the compensation allowed by law for the use, or forbearance, or detention of money or its equivalent, including without limitation, points, loan origination fees, credit service or carrying charges, charges for unanticipated late payments, and any other charges, direct or indirect, as an incident to or as a condition of the extension of credit. These charges do not include charges made by a third party.

S.D. Codified Laws Ann. § 54-3-1 (1990).

Section 54-3-1.1 of the South Dakota Codified Laws states, in relevant part, that:

> Unless a maximum interest rate or charge is specifically established elsewhere in the code, there is no maximum interest rate or charge, or

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[2] The section was amended during the pendency of this litigation.

> usury rate restriction between or among persons, corporations, estates, fiduciaries, associations, or any other entities if they establish the interest rate or charge by written agreement.

S.D. Codified Laws Ann. § 54-3-1.1 (1990).

STATEMENT

The Colorado Supreme Court, relying on its previous decision in ***Copeland***, held below that the law of a bank's home state, in this case South Dakota, provides the definition of "interest" in § 85. South Dakota's definition of interest includes late fees. *See* S.D. Codified Laws Ann. § 54-3-1 (1990). Incorporating that definition into § 85 results in South Dakota law preempting Colorado's prohibition of late charges on revolving credit accounts held by Colorado consumers. Can South Dakota enlarge the definition of a federal term in a federal statute and thereby determine and expand the scope of federal preemption? Can one state preempt without limitation the consumer protection and contract laws of all the other states? These are fundamental constitutional questions that are at issue here and in ***Smiley*** and ***Sherman***.

A. Background And Facts

Congress passed the National Bank Act in 1864 against the backdrop of the Civil War. The Act had two purposes – to establish a national banking system with a uniform national currency and to prevent states from discriminating against national banks with respect to interest rates. To prevent discrimination, Congress crafted into the Act a number of protective provisions, including, most notably, § 30,[3] now codified as § 85 and 12 U.S.C. § 86 ("§ 86"). Section 85 embodies the "most favored lender" doctrine enunciated by this Court in ***Tiffany v.***

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[3] Act of June 3, 1864, Ch. 106, § 30, 13 Stat. 99, 108 (codified as amended at 12 U.S.C. §§ 85 & 86 (1994)).

National Bank of Missouri, 85 U.S. (18 Wall.) 409 (1874). The doctrine allows a national bank to charge the highest "rate" of "interest" allowed by its home state. Section 85 also provides an alternative federal interest rate not measured by state law and permits a national bank to charge whichever of the two interest rates is higher. Section 86 then provides the penalty (twice the amount of interest charged) applicable in the event the bank charges more than the allowed rate.

Congress enacted these provisions intending the term "interest" to have a firm federal definition that would not depend on unique state definitions. *See Tiffany*, 85 U.S. at 410 (holding that "interest" must "receive a strict, that is literal construction" to avoid subjecting banks to the penalty of double the interest collected). Although the numerical rate of interest under the statute could vary from state to state, the meaning and substantive components of "interest" for national banks would be uniform throughout the country. In other words, § 85 incorporates only the rate ceilings of a bank's home state, not the states' varying definitions of "interest." *See National Bank v. Johnson*, 104 U.S. 271, 277 (1881) (construing *Tiffany* and holding that only the "rate" of interest is federalized by § 85, not the character of the contracts banks are authorized to make).

Years later, this Court, in *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978), considered the meaning of the word "located" in § 85 and the preemptive scope of the statute. Announcing what has become known as the "exportation" doctrine, the Court held that a national bank may "export" its home state's *interest rate* into other states. Though the Court held that "located" has a firm, federal definition, it did not define the terms "interest" or "rate," nor did it hold that the laws of a national bank's home state govern all the contractual terms or charges (other than "interest" as defined by Congress) imposed on consumers in other states.

Since *Marquette*, several small states (the "bank friendly states") and numerous banks have attempted to expand the "exportation" doctrine beyond the parameters established by this Court and Congress. During the 1980s, some of those states, most notably South Dakota, the current home of Citibank (South Dakota), N.A. ("Citibank" or the "bank"), and Delaware, sought to attract large credit card operations by deregulating banking and repealing consumer protection laws. *See* Federal Reserve Bank of Chicago, "Small States Teach a Big Banking Lesson," ***Chicago Fed. Letter***, No. 10 (June 1986).[4] Against the backdrop of *Marquette*, those states passed unique legislation that, contrary to the common law, defined "interest" as including late fees, attorneys' fees and other contract terms and penalties. The idea was to allow national and other banks in those states to "export" the terms and penalties into other states under the guise of "interest," a prospect that goes well beyond the exportation allowed under *Marquette*.

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[4] The bank friendly states' efforts to entice credit card issuers to relocate from other states have been wildly successful. *See* ***Chicago Fed. Letter, supra***. Today, of the top ten issuers, six are located in Delaware, while Citibank, the single largest issuer of Visa cards and Mastercards, is located in South Dakota. To keep even more card issuers from relocating to these deregulated states, other states have been forced to relent and repeal consumer protection statutes limiting penalty charges and other non-interest fees. *See* ***id.*** As this race to the bottom has unfolded, more and more consumers have lost the ability to effect legislative checks or balances on oppressive or unfair contract terms. If the federal term "interest" means "all lending terms," as Citibank has argued, and if only the laws of a bank's home state may define and regulate those lending terms, then § 85 has pitted state against state, making it politically impossible, as a practical matter, for citizens to effect legislative change on either the local or national levels.

The present case challenges the exportation of contract penalties by Citibank. From South Dakota, Citibank issues credit cards to customers nationwide. (App. 24-25, 28-29). Citibank charges these customers not only a hefty annual percentage rate, but also a separate and additional $10 late charge if a specified minimum payment is not received within a certain number of days after the payment due date.[5] (App. 28-29). Citibank charges the $10 flat fee regardless of the outstanding balance, the amount of the payment owed, or the actual number of days the payment is late. In addition, Citibank's cardholder agreement treats the late payment as a technical breach of the contract and does not waive the default even if the late fee is paid. (App. 29). Bearing no relationship to the amount owed, the passage of time or the bank's actual processing costs, and imposed in addition to continuing interest rate charges for delay, the late fee is a classic contract penalty. (*See* App. 38).

Citibank charges its late fees in every state, including those that prohibit or limit such liquidated damage provisions. Colorado is one of the states that regulates late fees. Here, Citibank exported its late fees into Colorado and imposed them on petitioner and other Colorado residents in violation of Colorado law. In response, cardholder filed this consumer class action on February 28, 1992, on behalf of herself and all other Colorado residents who have been charged late charges on credit cards issued by Citibank.[6] (App. 26).

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[5] This late charge was unilaterally increased to $15 by Citibank sometime after 1990. (App. 29).

[6] Cardholder's complaint asserts that, in charging the late fees, Citibank: (1) violated the Colorado Consumer Credit Code ("the Code"), Colo.Rev.Stat. § 5-3-203(5)(a), which prohibited delinquency charges (such as late fees) on revolving credit accounts prior to 1994 (App. 36-37); (2) violated Colo.Rev.Stat. § 5-5-202 by willfully failing to comply with Colo.Rev.Stat.

B. How The Federal Question Was Presented And Resolved Below

The district court granted summary judgment in favor of Citibank and denied the cardholders' summary judgment motion, holding that Colorado law regulating penalty charges is preempted by § 85. (App. 20).

The cardholder and Citibank jointly petitioned the Colorado Supreme Court pursuant to Colo.App.R. 50 for a writ of certiorari to review the case before judgment by the Colorado Court of Appeals. (App. 4). The court granted the petition on January 30, 1995. (App. 6).

On December 18, 1995, the Colorado Supreme Court affirmed dismissal of the case holding that its recent decision in ***Copeland*** was dispositive of the issues. (App. 4). In ***Copeland***, the Colorado Supreme Court stated that "this case does not raise a preemption issue." ***Copeland***, 907 P.2d at 89, n.4. According to the court, the fact that incorporating the bank's home state definition has an incidental effect on enforcement of Colorado law does not amount to a showing of preemptive effect. Since Congress has not attempted to interfere with Colorado's regulation of state banks or to occupy the field of consumer loans, the court reasoned that the dispositive issue was whether Congress intended for the bank's home state legislative definition of "interest rate" to displace Colorado's consumer protection and common laws prohibiting late fees. ***Id.*** The court then concluded that, as a matter of federal law, the late fees imposed by the bank are a form of "interest" under § 85. ***Id.*** at 89. Noting that Delaware, the bank's home state in the ***Copeland*** case, permits the imposition of late fees, the court held that the bank could

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§ 5-3-203(5)(a) (App. 35-36); (3) violated § 6-1-105 of the Colorado Consumer Protection Code by creating confusion in charging "Late Charges" which it now contends are "Finance Charges" (App. 38-39); and (4) was unjustly enriched. (App. 38).

charge such fees in Colorado despite Colorado's law to the contrary.[7] ***Id.***

Though stating that the dispositive issue was whether Congress intended for the law of the bank's home state to define "interest" in § 85 and thereby displace other states' laws, the court in ***Copeland*** devoted most of its opinion to determining whether, apart from Delaware law, late fees are "interest." Observing that § 85 itself does not define "interest" and that the legislative history does not address the issue, the court turned to judicial interpretations it deemed expansive. ***Id.*** at 90-92. Despite the absence of the phrase "related to" in § 85, and ***Tiffany's*** mandate of a "literal construction," the court inferred that, as banking has evolved, various other precedents have expanded the statute to include additional banking charges "related to" loans. *See* ***id.*** at 92. Based on this evolution, the court determined that a national bank can charge a variety of banking fees as forms of "interest" to credit cardholders in other states if allowed by the bank's home state. *See* ***id.*** Having previously stated that the legislative history of the National Bank Act does not answer the question, however, the court then contradicted itself and held that the Act's "purpose and legislative history compel a finding that late payment fees are a form of 'interest' under § 85." *See* ***id.*** at 94.

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[7] Pursuant to the Colorado UCCC choice of law provision, Colo.Rev.Stat. § 5-1-201(9)(a), Colorado law applies to all consumer credit contracts offered to Colorado residents where the lender has solicited the consumer in Colorado and the consumer has signed the application or accepted the contract in Colorado, as cardholder has alleged here. (*See* App. 27-35); *see also* ***Aldens, Inc. v. Ryan***, 571 F.2d 1159 (10th Cir.), *cert. denied*, 439 U.S. 860 (1978) (implicating Oklahoma choice-of-law doctrine); ***Aldens, Inc. v. LaFollette***, 552 F.2d 745 (7th Cir.), *cert. denied*, 434 U.S. 880 (1977) (implicating Wisconsin choice-of-law doctrine); ***Aldens, Inc. v. Packel***, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (implicating Pennsylvania choice-of-law doctrine).

In applying its holding in ***Copeland*** to the present case, the Colorado Supreme Court below concluded that because South Dakota permits the imposition of late fees, Citibank could charge such fees despite Colorado's law to the contrary. (App. 5).

REASONS FOR GRANTING THE PETITION

This Court should review and reverse the decision below because (i) it conflicts with the New Jersey Supreme Court's decision in ***Sherman*** on the same federal issues; (ii) it conflicts with controlling decisions of this Court, including ***Tiffany***; (iii) it endorses a form of state supremacy over other states; (iv) it disregards the pre-emption issue; (v) it gives unwarranted deference to informal and contradictory interpretations of the Office of the Comptroller of the Currency ("OCC"); and (vi) it has immediate nationwide impact on states, consumers and national banks.

A. The Colorado Supreme Court's Decision Conflicts With the New Jersey Supreme Court's Decision on the Same Federal Issues.

As noted, both the decision below and the California Supreme Court's opinion in ***Smiley*** conflict with the New Jersey Supreme Court's recent decision in ***Sherman***. All three cases involve the same practices by national banks and identical federal preemption issues. Like the California court in ***Smiley***, the Colorado Supreme Court rewrote the statute to add the phrase "related to" to § 85. In effect, the Colorado Supreme Court held that the laws of a national bank's home state dictate the charges "related to" a loan and thus define the federal term "interest" so as to set the preemptive scope of the federal statute. Accordingly, where, as here, the home state defines "interest" as including late fees, the laws of that one state operate to preempt all other states' consumer protection and contract laws regulating such penalty charges. The

New Jersey Supreme Court, however, reached a different result in ***Sherman***. Declining to rewrite the statute or to define "interest" in § 85 based on the home state's law, New Jersey's high court held that late fees are not "interest" and that § 85 does not preempt state regulation of late fees.[8] ***Sherman***, 143 N.J. at 45 and 55, 668 A.2d at 1040 and 1045.

Because these state supreme courts have decided the same federal issues oppositely, there is a direct conflict that should be resolved by this Court. In addition, numerous other cases involving the very same issues are pending nationwide and have resulted in additional conflicts.[9] These conflicts cannot be resolved by any other court and will result in different federal preemption standards for the same practice in different parts of the country. This Court should grant certiorari immediately to resolve these and the other conflicts we detail below.

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[8] In so holding, the New Jersey Supreme Court criticized or disagreed with a number of points made by the Colorado Supreme Court. For example, the New Jersey court disagreed with the Colorado Supreme Court's understanding of the historical usage of the term "interest" and with its reliance on the OCC's contradictory interpretations of the term. *See*, ***Sherman***, 143 N.J. at 56 and 59, 668 A.2d at 1046 and 1047.

[9] *See*, cases cited *supra* note 1. In Pennsylvania, the intermediate appellate court, like the New Jersey Supreme Court, ruled in favor of the cardholders in two cases, finding no preemption of state law. One of those decisions was decided *en banc*. *See* ***Mazaika v. Bank One, Columbus, N.A.***, 439 Pa. Super. 95, 653 A.2d 640 (1994) (*en banc*), *alloc. granted*, 659 A.2d 557 (Pa. 1995); ***In re Citibank (South Dakota) Credit Card Litig.***, 439 Pa. Super. 79, 653 A.2d 39 (1995), *alloc. granted*, 659 A.2d 984 (Pa. 1995). The Pennsylvania Supreme Court has stayed these cases pending this Court's decision in ***Smiley***.

B. The Colorado Supreme Court's Decision Has Wide-Ranging and Dangerous Consequences.

This case and ***Smiley*** implicate important issues that go beyond the preemption questions typically confronted by the Court. Unlike any other preemption case decided by the Court, the petition here and in ***Smiley*** challenge holdings that tie the scope of federal preemption directly to the ever-changing legislation of an individual state that is home to a national bank. If, as the Colorado Supreme Court has held, § 85 has been judicially amended to include all charges "related to" a loan so that South Dakota has been entrusted to define the components of "interest" and not just the arithmetic "rate," then South Dakota's legislative definition of loan-related charges has displaced the contract and consumer protection laws of all the other states. Under the ruling below, the breadth of preemption intended by Congress will be determined, not by federal law, but by state law so that it may vary from state to state and time to time.

The Colorado Supreme Court thus has endorsed a radical preemption doctrine unknown to any other federal statute. That doctrine establishes a form of state supremacy over other states that is unconfined by any federal standards limiting the preemptive actions of the favored states. If a bank's home state authorizes any loan-related fee or term, that authorization will preempt other state laws where the banks are soliciting business. In this way, the Colorado decision has allowed Congress to make the home states of banks supreme to all others.

This is so because the driving force behind the Colorado decision is a misconstruction of the "most favored lender" doctrine. Reading that doctrine expansively, the lower court has held in effect that all loan-related charges or terms must be "interest" if they are allowed for other lenders in a bank's home state. Under that analysis, attorneys' fees, court costs, foreclosure fees and other default

penalties would be federalized "interest" if allowed by a bank's home state. Thus, as South Dakota has done here, the home states of banks could preempt countless laws of other states simply by connecting their loan-related authorizations to the "interest" allowed in the home state.

In this regard, the decision below conflicts in principle with this Court's preemption analysis in ***New York State Conf. of Blue Cross & Blue Shields Plans v. Travelers Ins. Co.***, 115 S. Ct. 1671 (1995). In ***Travelers Ins. Co.***, this Court considered an express preemption clause which, unlike here, included the phrase "related to" in the express preemption scope of the federal statute. *See* ***id.*** at 1675. Contrary to the Colorado Supreme Court's analysis, this Court refused to read the phrase "related to" as including the entire economic package of insurance-related costs. *See* ***id.*** at 1679-80. Ignoring that decision, the Colorado Supreme Court not only added the phrase "related to" to § 85 but then even interpreted that section to include the entire package of loan-related charges in the preemptive scope of the statute. As a result, the Colorado Supreme Court judicially enlarged the federal statute in violation of this Court's preemption principles.

By linking the scope of "interest" to the laws of a bank's home state, the Colorado Supreme Court's decision conflicts with this Court's decisions interpreting § 85. In ***Haseltine v. Central Bank***, 183 U.S. 132 (1901), the Court held that "the definition of usury and the penalties affixed thereto must be determined by the National Banking Act, and not by the law of the State." ***Id.*** at 134. Similarly, in ***Evans v. National Bank***, 251 U.S. 108 (1919), the Court recognized that both "interest" and "usury" are determined by reference to federal law, stating:

> The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much

> arises from federal law. The latter also completely defines what constitutes the taking of usury by a national bank, *referring to the state law only to determine the maximum permitted rate.*

Id. at 114 (emphasis added). The holding of the court below ignores and impliedly rejects these controlling authorities.

Furthermore, in incorporating South Dakota's definition of interest into § 85, the court below utterly failed to recognize that Congress has never incorporated state law without limitation into a federal statute so that the state's law would preempt other states' laws. Congress has instead limited incorporation to well-defined areas in which the state standard would operate principally if not exclusively within the boundaries of the state itself, not in other states. *See, e.g.*, ***United States v. Sharpnack***, 355 U.S. 286 (1958) (addressing Assimilative Crimes Act of 1948, which adopted state law as the federal criminal law for military bases and federal enclaves located in each particular state).

This case is not one in which the incorporation of South Dakota law affects only South Dakota. The Colorado Supreme Court's ruling that South Dakota law defines "interest" or loan-related charges in § 85 leads to the absurd and unconstitutional result that Congress has authorized South Dakota to legislate federal lending terms for the entire country. The Constitution does not allow Citibank to define federal law with reference to its own state's laws and thereby elevate South Dakota law over the laws of Colorado and other states. Nor can the states constitutionally enlarge or diminish the scope of federal preemption by redefining the federal term "interest." "To vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of

Art. IV of the Constitution to prevent." ***Thomas v. Washington Gas Light Co.***, 448 U.S. 261, 272 (1980).

Moreover, the Colorado Supreme Court's decision conflicts with this Court's anti-delegation precedents. Article I, section 1 of the Constitution provides that "[a]ll legislative powers . . . *shall be vested in a Congress* of the United States." U.S. Const. art I, § 1 (emphasis added). If, as held below, the scope of "interest" in § 85 is determined by the law of a bank's home state, then Congress' delegation of such legislative authority to South Dakota violates Article I.

This Court's decision in ***Panama Refining Co. v. Ryan***, 293 U.S. 388 (1935), demonstrates the point. In that case, the Court described the standards for delegating congressional power and struck down a statute that delegated interstate policy-making authority to the President, who then adopted state laws as the operative restrictions. In rejecting the open-ended delegation, the Court focused on the absence of any guidelines limiting the scope or nature of the delegated authority:

> [The statute] does not seek to lay down rules for the guidance of state Legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority. . . . It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action.

Id. at 415. The Court also found that the context of the statute failed to provide any "standard or rule" against which the delegated authority could be measured. *Id.* at 418.

Here, delegation to South Dakota of the legislative power to define the federal term "interest" or charges "related to" interest likewise fails. Neither the word "interest" nor the legislative history of the National Bank

Act, as interpreted by the Colorado Supreme Court, provides any guidance to the states or to a reviewing court as to the scope of the term or the limits of the delegated discretion. As interpreted by the Colorado Supreme Court, Congress has provided no definition, established no standard, laid down no rule and declared no policy separate from that of the individual states and, therefore, the delegation is unconstitutional.[10] *See* ***Panama Refining***, 293 U.S. at 430 ("The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested").[11]

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[10] To be sure, ***Marquette***, in effect, permits a bank's home state to establish "interest rates" that are controlling in other states. But that result does not amount to a limitless delegation of Congress' lawmaking authority. The federalization of a time-based "*rate*" or required charge for a loan is bounded and checked by the firm, federal definition of "interest" advanced by petitioner. With that definition, it would be easy to determine whether a home state's "rate" comported with the will of Congress. If, however, as the Colorado Supreme Court has held, South Dakota can broaden the meaning of "interest" so as to determine what credit terms are lawful, then South Dakota would be engaged in lawmaking for the entire nation. As here, South Dakota would be defining not just an objective rate required for a loan, but also the actual rights and liabilities (*e.g.*, what does "late" mean; are attorneys' fees collectible) affecting citizens of other states. Nothing would stop South Dakota from authorizing lenders to charge as "interest" attorneys fees, court costs, foreclosure costs, collection costs or any other loan-related term which might arguably impact a lender's total return on its loans. Congress could not have intended to delegate its national lawmaking power in such a manner.

[11] Only Congress has open-ended discretion to choose the object and ends of national legislation. *See* Lawrence Tribe, ***American Constitutional Law*** § 5-17 at 363 (2d ed. 1988). Congress may not authorize individual states to choose between different legislative needs or to substitute the will of a state

To allow South Dakota law to define "interest" in § 85 and, in turn, the preemptive scope of the statute, is to allow that state to substitute its will for the will of Congress. The decision whether "interest" includes liquidated damages, attorneys' fees, court costs or other contractual penalties is "quintessentially one of legislative policy" that should be made by Congress, not by an individual state legislature that is unaccountable to the will of the nation. *See* ***Industrial Union Dep't v. American Petroleum Inst.***, 448 U.S. 607, 686 (1980) (Rehnquist J., concurring). Residents of Colorado and other affected states have no voting opportunity to influence the legislators in South Dakota. Absent accountability, the Colorado Supreme Court unlimited linkage of preemption to the loan terms authorized by a bank's home state would constitute a serious violation of the principles embodied in Articles I and IV of the Constitution. *Cf.* ***Florida Lime & Avocado Growers, Inc. v. Paul***, 373 U.S. 132 (1963).[12]

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legislature for that of Congress where such state decisions will have an impact nationally or on residents of other states:

> Congress cannot simply delegate to the states the power to legislate in areas that are reserved to Congress – e.g., powers under the interstate commerce clause – but Congress may by federal legislation adopt and incorporate by reference state laws that already exist or that may exist in the future. For example, *Congress cannot delegate to Illinois the power to legislate federal pollution standards for the whole country. Then Congress would be abdicating interstate commerce control to one state to legislate for the entire nation.*

1 R. Rotunda, J. Nowak, J. Young, ***Treatise on Constitutional Law – Substance and Procedure***, § 12.6 at 644(1986) (emphasis added). *See also* ***Yakus v. United States***, 321 U.S. 414, 425-26 (1944).

[12] In ***Florida Lime***, this Court refused to find a California law preempted where residents of that state had no real

Unless § 85 is read with reference to the common law so as to exclude late fees from the definition of "interest," each state could give a different meaning to the term. Each state, by making "interest" mean whatever it wanted, could determine the scope of federal preemption and extend its own lending laws into other states without limit. This Court has recognized that danger before. In ***First Nat'l Bank v. Dickinson***, 396 U.S. 122 (1969), the Court considered whether federal or state law defined the term "branch" in the National Bank Act. The Court stressed that permitting state legislatures to define the federal term "branch" would "make them the sole judges of their own powers," and that Congress "did not intend such an improbable result." *Id.* at 133-34. Here, too, Congress did not intend for South Dakota to define the scope of federal preemption and thereby be the sole judge of its own power. The Colorado Supreme Court's ruling conflicts with these principles and should be reviewed immediately.

C. The Colorado Supreme Court's Ruling Disregards the Preemption Issue, Misconstrues the Most Favored Lender Doctrine and Improperly Expands the Common Law Definition of "Interest."

Remarkably, the Colorado Supreme Court concluded that no preemption issue is raised by these cases. *See* ***Copeland***, 907 P.2d at 89, n.4. The court explained:

> The incorporation here of Delaware [or South Dakota] law has an incidental effect on enforcement of a provision of the Colorado UCCC

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opportunity to participate in the process that resulted in the federal regulation that allegedly superseded California's law. Here, too, Colorado residents have had no opportunity to participate in the process that allegedly has resulted in South Dakota law preempting Colorado law.

> when a Colorado resident, such as Copeland [or Richardson], chooses to obtain a loan from MBNA [or Citibank]. That fact, however, does not amount to a showing of preemptive effect. Congress has made no attempt either to interfere with Colorado's regulation of state chartered banks or to occupy the field of consumer loans.

Id.

In concluding that a preemption analysis does not even apply, the Colorado Supreme Court apparently misunderstood the guidelines established for implied conflict preemption in ***Rice v. Norman Williams Co.***, 458 U.S. 654 (1982). In *Rice*, this Court instructed that unless there is an actual, not just hypothetical, conflict between state and federal law, there can be no preemption. *Id.* at 659. The Court did not conclude that the absence of a direct conflict precludes preemption analysis, as the Colorado Supreme Court apparently believed. The Court reasoned instead that where there is no actual conflict but merely an "incidental effect," preemption is the issue but not the result. Thus, in accordance with *Rice*, instead of treating the case as one that does not raise preemption issues, the Colorado Supreme Court should have held outright that § 85 does not preempt Colorado's regulation of late fees on credit cards because there is no actual conflict between federal law and Colorado law.

In fact, the Colorado Supreme Court's decision disregards even the most basic preemption principles. As this Court has held time and again, there is a strong presumption *against* federal preemption of state law. *See* ***Maryland v. Louisiana***, 451 U.S. 725, 746 (1981). As a result of that presumption, " 'the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the *clear and manifest purpose* of Congress.' " ***Cipollone v. Liggett Group, Inc.***, 505 U.S. 504, 516 (1992) (plurality opinion) (emphasis added) (quoting ***Rice v. Santa Fe Elevator Corp.***, 331 U.S. 218, 230 (1947)). Unless

a state law "incapacitates the [national] banks from discharging their duties to the government," there will be no preemption. ***McClellan v. Chipman***, 164 U.S. 347, 357 (1896). *Accord* ***Sherman***, 143 N.J. at 45-46, 668 A.2d at 1040-41.

The Colorado Supreme Court recognized that neither § 85 nor the legislative history contains any clear statements of Congressional intent to preempt state regulation of late fees. Nevertheless, the court held that, if Congress had intended to limit preemption to numerical percentage rates it would have said so. *See*, ***Copeland***, 907 P.2d at 93. In other words, according to the Colorado Supreme Court, whenever Congress enacts a federal statute, if it is silent with respect to the scope of preemption, it intends to preempt everything not mentioned. That analysis directly conflicts with the standards set forth in ***Cipollone***, ***McClellan*** and dozens of other decisions by this Court.

Nor does ***Marquette*** support an expansive reading of federal preemption principles, as inferred by the Colorado Supreme Court. ***Marquette*** established a firm, federal definition of the word "located" in § 85 and held only that a national bank may export its home state's *rate* of interest. *See* 439 U.S. at 313-14. Since South Dakota's definition of the components of interest has nothing to do with the unlimited *rate* at which interest is allowed in that state, ***Marquette*** provides no basis for exporting South Dakota's definition of interest. *See* ***Sherman***, 143 N.J. at 48-49, 668 A.2d at 1042. Citibank may still charge the unlimited rates allowed by its home state when it solicits consumers in Colorado and other states. It may not, however, impose a separate, sum-certain penalty fee which is neither a "rate" based on the time value of the money owed nor "interest." Because Colorado law as alleged by cardholder does not limit the amount of Citibank's "interest rates," but only the form of Citibank's non-interest charges, it does not conflict with § 85.

The Colorado Supreme Court's decision also directly conflicts with the common law interpretation of federal statutes mandated by this Court. This Court recently reaffirmed the strong presumption of a common law meaning for words used in a federal statute in ***United States v. Texas***, 507 U.S. 529 (1993). In that case, which likewise considered the meaning of "interest" in a federal statute, the Court instructed:

> "[s]tatutes which invade the common law- . . . are to be read with a presumption favoring the retention of long-established and familiar principles". . . . In such cases, Congress does not write upon a clean slate. . . . In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

507 U.S. at 534 (citations omitted); *see also* ***United States v. Shabani***, 115 S. Ct. 382, 384 (1994). The Court also distinguished between interest and penalties (including late fees) and found that penalties are "more onerous than the common law" of prejudgment interest. *Texas*, 507 U.S. at 536 ("Unlike the common law, § 3717 also imposes processing fees and penalty charges"). Penalties cannot be "more onerous" than interest if they are one and the same, as the Colorado Supreme Court incorrectly held.

The Colorado Supreme Court also erroneously assumed that Congress, by its silence, intended to change the common law when it used the word "interest" in § 85. Because § 85 does not " 'speak directly' to the question addressed by the common law," however, it does not abrogate that common law. ***Id.*** at 534. Therefore, Congress must have intended that "interest" in § 85 would be construed uniformly based on the ordinary, common law meaning of the term. *See* ***Perrin v. United States***, 444 U.S. 37, 42 (1979).

Congress was fully aware of the ordinary, common law differences between late charges and interest when it

passed the National Bank Act in 1864.[13] On at least three occasions before passage of the Act, this Court had already held that sum-certain contingent default charges, like late fees, were not "interest." For example, in ***Tayloe v. Sandiford***, 20 U.S. 13, 17, 7 Wheat. 7, 8 (1822), the Court recognized that "[i]n general, a sum of money in gross, to be paid for the non-performance of an agreement, is considered as a penalty. . . . " Later, in ***Lloyd v. Scott***, the Court held:

> If a party agree [sic] to pay a specific sum, exceeding the lawful interest, provided he do [sic] not pay the principal by a day certain, it is not usury. By a punctual payment of the principal, he may avoid the payment of the sum stated, *which is considered as a penalty.*

29 U.S. 205, 226, 4 Pet. 173, 190 (1830) (emphasis added). Likewise, just one year before enactment of the National Bank Act, the Court stated with respect to any contingent charge:

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[13] Even the context of the language demonstrates that Congress understood that "interest" is compensation related to the time value of money. Though § 85 permits a national bank to charge interest at the highest "rate" allowed to any lender in its home state, the statute does not authorize the bank to impose late fees or any type of lending charge other than an interest "rate." In fact, the term "rate" appears in the statute at least nine times, and it always refers to a charge that is related to the passage of time. In contrast, § 86 of the Act provides that where an excessive rate has been charged, the borrower may recover damages in an "amount" equal to twice the interest paid. Unlike the term "rate" in § 85, the term "amount" in § 86 refers to sum-certain damages or penalties that are totally unrelated to the passage of time. *See* ***First Nat'l Bank v. Morgan***, 132 U.S. 141, 144-45 (1889) (§ 86 case where this Court recognized a material difference between compensatory "interest" and deterrent or punitive "penalties").

> The payment of anything additional depends also upon a contingency, and not upon any happening of a certain event, which of itself would be deemed insufficient to make a loan usurious.

Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 626 (1863). Because Congress also was well aware that "[t]he popular or received import of words furnishes the general rule for the interpretation of public laws," ***Maillard v. Lawrence***, 57 U.S. (16 How.) 251, 261 (1853), it must have used the term "interest" as it was ordinarily understood at common law to exclude contingent, sum-certain penalties imposed in addition to continuing finance charges.[14]

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[14] Ancient law also shows that "interest" and sum-certain contract penalties are not the same. At Roman law, the only "interest" that was allowed was that measured by time following a default. In effect, "interesse" (interest) and penalties were the same. But the measure of the "interest" (then called penalty) was based on the unpaid balance and measured by time. Any greater amount was a classic contract penalty ("nomine paenoe") that was "relievable against in equity." *See* Robert B. Comyn, ***Treatise on the Law of Usury***, 73-74 & n.(a) (R. Pheney, London 1817); *see also* ***Library of Congress v. Shaw***, 478 U.S. 310, 315 n.2 (1986). Today, as in Roman times, "interest" following a loan default is likewise limited and must be measured by the *"id quod interest"* (that which is between) standard. *See* ***Shaw***, 478 U.S. at 315 n.2. Although "interest" for a loan or forbearance is now allowed as well (at Roman times such interest was not lawful), the time measurement for default charges persists. *See* ***id.*** If a time measurement is absent, the default charge is a contract penalty or forfeiture, because the amount is presumed to exceed the time value of money. *See* ***Meilink v. Unemployment Resources Comm'n***, 314 U.S. 564, 570 (1942); *see also* ***Merchants' Nat'l Bank v. Sevier***, 14 F. 662, 663 and 667-75 (C.C.E.D. Ark. 1882) (National Bank Act case surveying the differences between the common law of penalties and statutory usury principles).

At common law, "special damages" that more than compensated a lender for the time-value of money were prohibited. For example, in ***Loudon v. Taxing District***, 104 U.S. (14 Otto) 771 (1881), a borrower defaulted, requiring the lender to sell his own assets at a substantial discount. The lender sued for the "costs" of the default. The issue was whether the borrower was liable for more than the time-value of the lender's money. This Court held that interest measured by time is the *only* damage allowed:

> *[A]ll damages for delay* in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages.

Id. at 774 (emphasis added). *See also* ***New Orleans Ins. Co. v. Piaggio***, 83 U.S. (16 Wall.) 378, 386 (1872) (a party "cannot recover special damages for the detention of money due to him beyond what the law allows as interest").

The Colorado Supreme Court turned the reasoning of this common law upside down. Instead of holding that "interest" based on the unpaid balance and the passage of time is the "measure of all such damages," the court effectively found that additional, sum-certain "penalties" are the measure of all "interest." That holding completely disregards the guidelines established by this Court in ***Texas, Tayloe, Lloyd, Spain, Loudon*** and ***Piaggio***.

To be sure, "interest" in § 85 may include "damages" paid after a loan default, such as back-end charges to compensate the lender for the time value of its money. Those "damages" that are based on an unpaid balance and measured by time may be "interest in the nature of damages." But contingent sum-certain charges like credit card late fees, attorneys' fees, return check fees and over-limit fees, because they are neither based on the unpaid balance nor measured by time, are not "interest in the

nature of damages." *See* ***Meilink v. Unemployment Resources Comm'n***, 314 U.S. 564, 570 (1942) (the distinction that a "penalty is a fixed ad valorem amount taking no account of time, and interest which does depend on time, is persuasive"). Thus, as this Court has recognized, where a sum-certain default charge is contingent (not required for the loan or forbearance) and is not related to time or the unpaid balance, it is a contract penalty rather than "interest in the nature of damages." *See* ***United States v. Childs***, 266 U.S. 304, 307 (1924) ("[a] penalty is a means of punishment; interest a means of compensation"). At common law, such a penalty charge was against public policy and unenforceable. ***Kothe v. R.C. Taylor Trust***, 280 U.S. 224, 226 (1930) ("But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced"). The decision below conflicts with these common law principles and improperly allows one state's legislative decisions to preempt the contract laws of other states.

D. The Colorado Supreme Court Erroneously Deferred to the OCC's Contradictory Interpretations of "Interest" in § 85.

The Colorado Supreme Court also erred in giving deference to the OCC's interpretation of "interest" under § 85. *Cf.* ***Adam's Fruit Co. v. Barrett***, 494 U.S. 638, 649 (1990) (where a federal statute provides a private right of action and federal remedy, Congress has expressly established the judiciary and not a federal agency as the interpretitive authority for the statute's preemptive scope). Though the views of an agency charged with the administration of a statute may be afforded some deference, as this Court instructed in ***INS v. Cardoza-Fonseca***, 480 U.S. 421, 441 n. 30 (1987), far less deference is appropriate when the agency's interpretations have been inconsistent. *Accord* ***Sherman***, 143 N.J. at 58, 668 A.2d at 1047. Here, the OCC has issued conflicting analyses repeatedly.

In 1964, for example, the Comptroller of the Currency himself issued a formal letter that addressed the meaning of "interest" in § 85 and opined that "*[c]harges for late payments* . . . are illustrations of charges which are made by some banks which *would not properly be characterized as interest*." OCC Letter, J. Saxon, Comptroller of the Currency (June 25, 1964) (emphasis added).[15] *See* ***Sherman***, 143 N.J. at 59, 668 A.2d at 1047. For the next twenty-four (24) years, the Comptroller's 1964 interpretation remained the view of the OCC. However, in 1988, the OCC staff took a different approach. In an informal opinion letter, the deputy chief counsel for the OCC concluded that "interest rate" in § 85 is defined by the law of a bank's home state, and if the state definition includes late fees or even attorney fees, then "interest" in § 85 includes late fees and attorney's fees. OCC Letter No. 452, R. Serino, Deputy Chief Counsel, *reprinted in* [1988-1989 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,676 (Aug. 11, 1988).[16] Then, in 1995, taking yet another approach, an OCC attorney wrote that federal law, not state law, provides the definition of "interest" in § 85, and that under federal law, "interest" includes all expenses and charges related to a loan. OCC Letter No. 676, J. Williams, Chief Counsel, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH)

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[15] Ignoring this letter from the Comptroller himself, the Colorado Supreme Court for some unknown reason instead cited 12 C.F.R. § 7.7378. That regulation, which provides that "[a] national bank may issue credit cards, either directly or through a subsidiary corporation," is irrelevant to the question of whether or not late fees are "interest " under § 85.

[16] In the past, the OCC has represented to this Court that informal staff letters written by OCC deputies or staff lawyers are neither binding nor entitled to deference. *See* OCC's *amicus curiae* brief filed in ***NationsBank, N.A. v. Variable Annuity Life Ins. Co.***, 115 S. Ct. 810 (1995).

¶ 83,618 (Feb. 17, 1995).[17] These conflicting analyses, among others,[18] demonstrate that the OCC's views do not warrant the deference afforded by the Colorado Supreme Court. *See* ***Sherman***, 143 N.J. at 57-60, 668 A.2d at 1046-1048.

E. Review Is Necessary to Provide Guidance to States, Banks, Consumers and the Lower Courts.

The question of whether "interest" in § 85 can be defined by state law to include contract penalties is one

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[17] The Williams letter violated the Reigle-Neal Interstate Banking and Branching Efficiency Act of 1994, Public Law No. 103-328, § 114, 108 Stat. 2238, 2366 (*codified* at 12 U.S.C. § 43 (1994)). That statute makes it clear that the OCC cannot issue an opinion concluding that state law is preempted unless it first follows certain stringent publication procedures. *See*, 12 U.S.C. § 43. The OCC did not follow those procedures in issuing the Williams letter. *See*, H. Conf. Rep. No. 651, 103d Cong., 2d Sess. 53 (1994) *reprinted in* 1994 U.S.C.C.A.N. 2039, 2068-74.

[18] The OCC has even changed its analysis during the course of this case. When this litigation began, the OCC maintained that the term "interest" in § 85 had to be defined pursuant to the law of a bank's home state. *See* [1988-1989] Fed. Banking L. Rep. ¶ 85,676 (opining that the law of a bank's home state defines "interest" in § 85). Now, the OCC contends, as petitioner has argued all along, that federal law must define the term. *See* [1994-1995] Fed. Banking L. Rep. ¶ 83,618 (opining that federal law defines "interest"). The OCC even conceded in recent briefs that certain of its informal opinion letters concluding that late fees are "interest" "overstate the role of state law." Also, in direct response to this and related litigation, the OCC has issued a rule which interprets "interest" in § 85, over 100 years after the fact, to include late fees and thereby preempt state laws limiting such penalties. *See* 61 Fed. Reg. 4849-4870 (1996) (noting that the interpretation constitutes a "significant change" in OCC policy). The rule lacks any reasoned explanation for the OCC's inconsistent and contradictory positions.

of national importance to consumers, each of the fifty states and numerous national banks throughout the country. Back in 1992, Massachusetts and twenty-seven states asked this Court to review almost the exact same issues and to reverse a lower court decision finding preemption in ***Massachusetts v. Greenwood Trust Co.***, 113 S. Ct. 974 (1993) (denying certiorari).[19] Though the Court declined to review the matter at that time, the controversy has not gone away. In fact, litigation is now pending nationwide.

The sheer number of cases pending, the conflicting opinions and the six petitions for certiorari (including the ***Smiley*** petition which was previously granted) now before the Court demonstrate the national significance of the issues and the urgent need for guidance from this Court. Until the Court decides the questions raised here, the controversy will continue, draining the pockets of consumers and litigants and the resources of the courts. To attract major credit card operations, state legislators will continue their race to the bottom in consumer protection by defining "interest" to embrace countless fees, including court costs and even attorneys' fees. National banks located in those states will continue to export the contract penalties in violation of other states' laws, and consumers will continue to suffer from the unlawful practice.

Just as these issues recently have been deemed appropriate for discretionary review in ***Smiley*** they are appropriate for review in this case.

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[19] The only difference was that the ***Greenwood*** case involved the definition of "interest" in § 521 of DIDA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 15, 1996

SUPREME COURT, STATE OF COLORADO
DECEMBER 18, 1995
NO. 94SC670

SUSAN L. RICHARDSON, on behalf of herself and all others similarly situated, Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A., Respondent.

Certiorari to the Colorado Court of Appeals
Pursuant to C.A.R. 50

EN BANC JUDGMENT AFFIRMED

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JUSTICE MULLARKEY delivered the Opinion of the Court.
JUSTICE SCOTT does not participate.

We granted certiorari pursuant to C.A.R. 50 to review the district court's decision in *Richardson v. Citibank*

(South Dakota), N.A., No. 92CV1460 (Colo. Dist. Ct. Mar. 21, 1994). The district court granted summary judgment in favor of Citibank (South Dakota), N.A. (Citibank), holding that section 85 of the National Bank Act (NBA), 12 U.S.C. section 85 (1982), preempts section 5-3-203(5)(a) of the Colorado Uniform Consumer Credit Code (UCCC), section 5-3-203(5)(a), 2 C.R.S. (1992). The district court allowed a national bank located in South Dakota to charge a fifteen dollar late payment fee in addition to a finance charge to the credit card accounts of its Colorado customers. Susan L. Richardson (Richardson) and Citibank jointly petitioned, pursuant to C.A.R. 50, for a writ of certiorari to review this case before judgment by the court of appeals. We affirm the judgment of the district court, but we base our decision on different grounds.

The respondent, Citibank, is a national bank located in South Dakota which issues VISA and MasterCard credit cards. The petitioner, Richardson, a Colorado resident, became a Citibank VISA credit card member. When Richardson failed to make a minimum monthly payment, Citibank assessed her VISA credit card account a fifteen dollar late payment fee. Richardson initiated this class action, on behalf of herself and all others similarly situated, alleging that Citibank's imposition of a late payment fee violated section 5-3-203(5)(a) of the UCCC, section 5-3-203(5)(a), 2 C.R.S. (1992). Citibank contends that section 85 of the NBA, 12 U.S.C. section 85 (1982), preempts the Colorado consumer protection law.

Copeland v. MBNA Am. Bank, N.A., No. 94SC409 (Colo. Nov. 20, 1995), is dispositive of the issue in this case. There, this court held that, as a matter of federal law, a late payment fee imposed on a customer's credit

card account is a form of "interest" under section 85 of the NBA, 12 U.S.C. section 85 (1982).[1] This court held that federal law authorized a national bank located in Delaware to assess a fifteen dollar late payment fee, allowed under Delaware law, to the credit card account of a Colorado resident despite the fact that a Colorado consumer protection law prohibited such fees.

Accordingly, applying that decision to *Richardson*, we conclude that because Citibank is a national bank located in South Dakota, and South Dakota law permits the imposition of a late payment fee, Citibank can charge Richardson a late payment fee despite the fact that a Colorado consumer protection law prohibited such fees. Hence, we affirm the judgment of the district court.

JUSTICE SCOTT does not participate.

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[1] Since we decided *Copeland*, the New Jersey Supreme Court has held that late payment fees are not "interest" within the intent and purpose of section 85 of the National Bank Act. *Sherman v. Citibank (South Dakota, N.A.)*, No. A-102-94 (N.J. Nov. 28, 1995). Although we acknowledge this recent decision, we are not persuaded by the court's reasoning.

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC670
RULE 50 CERTIORARI TO THE COLORADO
COURT OF APPEALS, 94CA0554
DISTRICT COURT, CITY AND
COUNTY OF DENVER, 92CV1460

ORDER OF COURT

SUSAN L. RICHARDSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals pursuant to C.A.R. 50, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, GRANTED. The briefs shall be filed as follows:

(a) Petitioner's Opening Brief shall be filed within forty days from this date;

(b) Respondent's Answer Brief shall be filed within thirty days from receipt of the Opening Brief;

(c) Petitioner's Reply Brief may be filed within fourteen days from receipt of the Answer Brief.

IT IS FURTHER ORDERED that the request to consolidate shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 30, 1995.
JUSTICE SCOTT does not participate.

[SEAL]

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Colorado Court of Appeals

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92-CV-1460, Courtroom 9

ORDER

SUSAN L. RICHARDSON, on behalf of herself and all others similarly situated,

Plaintiff,

v.

CITIBANK (South Dakota), N.A.,

Defendant.

THIS MATTER is before the Court on the Plaintiff's Motion for Summary Judgment for alleged violations of the Colorado Consumer Credit Code, and on Defendant's Motion for Summary Judgment on its Counterclaim for Declaratory Relief. Both Motions were filed on September 18, 1992.

The Plaintiff initially filed a Class Action Complaint with four claims for relief, including two violations of the Colorado Consumer Credit Code (C.R.S. §§ 5-3-203 and 5-5-202) alleging that the Credit Code prohibits the charging of late fees by lender credit card issuers. The named Defendants in that complaint were Citibank (South Dakota), N.A., and Ronald Williamson, C.O., Citibank

(South Dakota), N.A. On July 1, 1992 both parties stipulated to the dismissal of Ronald Williamson as a party in the matter. He was dismissed as a party on July 7, 1992.

At a status conference on September 11, 1992, the Court and counsel determined that the alleged violations of the Colorado Consumer Credit Code were amenable to summary judgment. A Scheduling Order was issued whereby both parties were allowed to amend their pleadings to plead an additional claim of declaratory relief or an additional counterclaim for declaratory relief on or before September 18, 1992, to file Motions for Summary Judgment on or before September 18, 1992, to file Responses to the Motions for Summary Judgment on or before October 9, 1992 and to file Reply Briefs to the Responses on or before October 19, 1992.

In compliance with the Scheduling Order, the Plaintiff filed a First Amendment to the Complaint, adding a fifth claim for relief – Declaratory Judgment. She also filed a Motion for Summary Judgment as to her first and second claims for relief, the Colorado Consumer Credit Code violations, on September 18, 1992. Included with the Motion for Summary Judgment, the Plaintiff attached a Memorandum Brief in Support of the Motion for Summary Judgment along with Exhibits Relied Upon or Cited in the Memorandum Brief and Principal Authorities Relied Upon or Cited in the Memorandum Brief.

The Defendant filed an Amendment to its Answer for the Purpose of Asserting a Counterclaim for Declaratory Judgment. It also filed a Motion for Summary Judgment on its Counterclaim for Declaratory Judgment on September 18, 1992. Included with the Motion for Summary

Judgment, the Defendant attached a Memorandum of Points and Authorities.

The Defendant filed an Answer to the Plaintiff's First Amendment to the Complaint on October 7, 1992. The Plaintiff filed a Reply to the Defendant's Counterclaim for Declaratory Relief on October 8, 1992.

In compliance with the Scheduling Order, both parties filed timely Responses to the opposing Motions for Summary Judgment. On October 9, 1992, the Plaintiff filed a Memorandum Brief in Opposition of Defendant's Motion for Summary Judgment, and the Defendant filed a Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment. Both parties filed timely Reply Briefs to the above Responses on October 19, 1992. The Defendant filed a Motion for Leave to File Sur-Reply in Opposition to Plaintiff's Motion for Summary Judgment, which has been **DENIED.**

The Plaintiff filed two Motions to Consolidate this case with similar cases. On November 10, 1992, the Plaintiff filed a Motion to Consolidate with *Stoorman v. Greenwood Trust Co.,* No. 92 CV 1789 (Denver Dist. Ct. Feb. 4, 1993). This Motion became moot when Greenwood Trust Co.'s Motion for Summary Judgment was granted. On June 3, 1993, the Plaintiff filed a Motion to Consolidate with *Copeland v. MBNA America, N.A.,* No. 92 CV 3909 (Denver Dist. Ct. July 9, 1993). This Motion became moot when the MBNA America's Motion for Judgment on the Pleadings was granted. Both Motions to Consolidate are **DENIED.**

To assist the Court in deciding this issue, the United States, on behalf of the Office of Comptroller of the

Currency, filed a Motion for Leave to file a Statement of Interest as Amicus Curiae, and the Colorado Bankers Association filed a Motion for Leave to file a Brief as Amicus Curiae. Both of these Motions are **GRANTED**. The Plaintiff filed a Brief in Response to the Amicus Curiae Brief of the Colorado Bankers Association and a Supplemental Response to the Amicus Curiae Brief filed by the Office of the Comptroller. The United States filed a Motion for Leave to file a Reply to Plaintiff's Supplemental Response, which is **GRANTED**. The Colorado Bankers Association filed a Reply Brief of Amicus Curiae. All of the preceding documents have been reviewed by the Court.

Both parties have kept the Court fully advised as to the developing case law in this area by providing supplemental authority for the record. The following Motions for Leave to Supplement the Record are **GRANTED**:

1. Defendant's December 4, 1992 Motion for Leave to File Supplemental Memorandum, including the Supplemental Memorandum, notifying the Court of *Sherman v. Citibank (South Dakota)*. No. L-01834-92 (Superior Court of New Jersey, Camden County, NJ, Nov. 25 1992) and *In Re Citibank (South Dakota)* N.A. Credit Card Litigation, No. 2557 (Court of Common Pleas, Philadelphia County, PA, Nov. 12, 1992).

2. Defendant's December 31, 1992 Motion for Permission to Cite Additional Authority, citing *Mazaika v. Bank One, Columbus. N.A.*, (Court of Common Pleas, Philadelphia County, PA, December 17, 1992).

3. Defendant's January 14, 1993 Notice of Modification of Earlier Citation of Authority, citing *Greenwood*

Trust Co. v. Massachusetts, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, No. 92-794 (U.S. Jan. 11, 1993).

4. Defendant's February 9, 1993 Motion for Leave to File Second Memorandum in support of its Motion for Summary Judgment, including the Memorandum, notifying the Court of the dismissal of *Stoorman v. Greenwood Trust Co.*, No. 92 CV 1789 (Denver Dist. Ct. Feb. 4, 1993).

5. Plaintiff's February 16, 1993 Motion for Leave to File a Reply to Defendant's Second Supplemental Memorandum, advising the Court that a Notice of Appeal has been filed for *Stoorman v. Greenwood Trust Co.*, No. 92 CV 1789 (Denver Dist. Ct. Feb. 4, 1993).

6. Defendant's March 12, 1993 Motion for Leave to File Third Memorandum, in support of its Motion for Summary Judgment, including the Memorandum, advising the Court that *Lawrence and Deborah Gilbert and David A. Tompkins v. Greenwood Trust Co.*, No. 1233, (Court of Common Pleas, Philadelphia County, PA, March 11, 1993) was dismissed.

7. Defendant's April 26, 1993 Motion for Leave to File Fourth Memorandum, in support of its Motion for Summary Judgment, including the Memorandum, advising the Court of Colorado legislation to permit late payment fees of $15 for credit cards issued to Colorado consumers and of *Goehl v. Mellon Bank (DE)*, No. 92-2547 (E.D. Pa. Apr. 21, 1993) and *Ament v. PNC National Bank*, No. 92-244 (W.D. Pa. Dec. 29, 1992).

8. Plaintiff's May 12, 1993 Motion for Leave to Supplement Her Motion in Support of Her Motion for Summary Judgment, advising the Court that *Copeland v.*

MBNA America. N.A., No. 92-C-1388 (D. Colo. May 7, 1993) was remanded from federal court back to state court.

9. May 17, 1993 Response of Citibank (South Dakota), N.A. to Plaintiff's Motion for Leave to Supplement Her Memorandum in Support of Her Motion for Summary Judgment.

10. Defendant's July 15, 1993 Notice of Authority in Support of its Motion for Summary Judgment and Notice of Mootness of Motion to Consolidate, notifying the Court of the dismissal of *Copeland v. MBNA America, N.A.*, No. 92 CV 3909 (Denver Dist. Ct. July 9, 1993).

11. October 15, 1993 Notice of Additional Authority of Citibank in Support of its Motion for Summary Judgment, advising the Court of decisions in *Smiley v. Citibank (South Dakota). N.A.*, No. BC059202 (Calif. Super. Ct. September 14, 1993), *Wisconsin v. Ameritech Corp.*, No. 92-CV-1013 (Wis. Cir. Ct. July 14, 1993), and *Cade v. H & R Block, Inc.*, Civ. No. 4:92-1454-21 (D.S.C. July 16 and Aug. 17, 1993).

12. Defendant's November 4, 1993 Notice of Subsequent History of Cited Case, advising the Court that *Mazaika v. Bank One, Columbus. N.A.*, (Court of Common Pleas, Philadelphia County, PA, December 17, 1992) had been affirmed on appeal to the Superior Court of Pennsylvania.

13. Plaintiff's January 5, 1994 Notice of Supplemental Authority, advising the Court of *Irwin v. Citibank (South Dakota) N.A.*, Case No. 9112-2557 (Court of Common Please [sic], Philadelphia County, December 9, 1993).

14. Defendant's January 14, 1994 Notice of Subsequent Developments in Cases Cited in Prior Filings. The Notice advises the Court that an Interlocutory Appeal on *Irwin v. Citibank (South Dakota), N.A.*, Case No. 9112-2557 (Court of Common Pleas, Philadelphia County, December 9, 1993) had been accepted by the Superior Court of Pennsylvania and that the Superior Court had withdrawn its decision and ordered *en banc* reargument of the case in *Mazaika v. Bank One, Columbus, N.A.*, (Court of Common Pleas, Philadelphia County, PA, December 17, 1992).

The preceding supplemental authority has been fully reviewed by the Court.

When there is no genuine issue of material fact in dispute, summary judgment is proper. *Abrahamsen v. Mountain States Telephone & Telegraph*, 177 Colo. 422, 494 P.2d 1287 (1972).

There is little dispute as to the relevant facts in this case. The Plaintiff is a Colorado resident. Citibank (South Dakota), N.A. is a nationally chartered banking association located in South Dakota. Citibank has charged late fees in Colorado on holders of the Citibank classic credit cards issued by the Defendant. The Plaintiff alleges that Citibank charged her a $15.00 late fee for failure to pay her minimum monthly installment, and did so on at least four separate occasions. Plaintiff's Class Action Complaint ¶ 14. Memorandum of Points and Authorities in Support of the Motion for Summary Judgment by Citibank (South Dakota), N.A. at 4.

The statutory law involved in the case is straightforward. At the time that the suit was filed, the Colorado Consumer Credit Code prohibited the imposition of

delinquency fees on lender credit card accounts, or at least did not expressly permit delinquency fees.

> 5(a) Except as provided in paragraph (b) of this subsection (5), with respect to a consumer loan, refinancing, or consolidation which is not pre-computed, including a revolving loan account, the parties may contract for a delinquency charge on any instalment [sic] not paid in full within ten days after its schedule due date in an amount not exceeding the lesser of five percent of the unpaid amount of the instalment [sic] or ten dollars; except that the provisions of this paragraph (a) **shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.**

C.R.S. § 5-3-203(5)(a). (Emphasis supplied).

Arguably, this section would prohibit out-of-state banks from charging delinquency fees in Colorado. The Colorado legislature has since added a provision which allows delinquency fees to be charged on lender credit cards. C.R.S. § 5-3-203(6).

Federal law, specifically § 85 of the National Bank Act, allows for a national bank to "charge interest at the rate allowed by the laws of the State . . . where the bank is located." 12 U.S.C. § 85. For Citibank that would be the rate allowed by South Dakota. Under South Dakota law, a bank or lending institution is allowed to assess a late charge on customers who fail to pay the minimum monthly amount. S.D. Codified Laws Ann. § 51A-12-13. Arguably, in Colorado these fees are prohibited. The issue is whether § 85 of the National Bank Act preempts the

Colorado law with regard to late fees thereby allowing the South Dakota law to control.

The starting point of the analysis is the Supreme Court decision in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299 (1978). *Marquette* affirmed what is clear on the face of Section 85 of the National Bank Act, "that a national bank may charge interest 'on any loan' at the rate allowed by the law of the State in which it is 'located.' *Marquette* at 308, citing 12 U.S.C § 85. *Marquette* also stated that a "close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that . . . Congress intended to facilitate . . . a 'national banking system.' " *Marquette* at 315, citing Cong. Globe, 38th Cong., lst Session, 1451 (1864).

The Court must determine what the term interest means, and whether it encompasses the delinquency fees charged by Citibank. The term is not defined in the National Bank Act. The Plaintiff has provided little authority supporting its position that the term interest refers only to percentage rates of interest and only preempts state laws referring to the same. Plaintiff's Memorandum Brief in Support of Summary Judgment at 42. The Plaintiff's argument that the plain meaning of interest does not allow for the term to mean anything beyond percentage rates of interest is unpersuasive, considering the weight of authority indicating a much broader interpretation. Plaintiff's Memorandum Brief in Support of Summary Judgment at 29.

The Defendant has provided a litany of authority supporting its argument that the term interest in the

National Bank Act applies to much more than just percentage rates of interest. Included in this line of authority are cases essentially similar to the one at bar in which late fees were considered to be interest for purposes of the National Bank Act, and as such the controlling law was the law of the national bank's home state. Foremost of these cases is *Nelson v. Citibank (South Dakota). N.A.*, 794 F.Supp. 312 (D.Minn. 1992). Similar decisions have been reached in a number of cases including *Goehl v. Mellon Bank (DE)*, No. 92-2547 (E.D. Pa. Apr. 21, 1993), *Sherman v. Citibank (South Dakota)*, No. L-01834-92 (Superior Court of New Jersey, Camden County, NJ, Nov. 25, 1992) and *Smiley v. Citibank (South Dakota). N.A.*, No. BC059202 (Calif. Super. Ct. September 14, 1993).

Courts have consistently taken an expansive view of the term interest as applied in § 85. *Fisher v. First National Bank*, 548 F.2d 255 (8th Cir. 1977) (flat fees for cash advances); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F.2d 855 (6th Cir. 1972) (closing costs); *American Timber & Trading Co. v. First National Bank*, 690 F.2d 781 (9th Cir. 1982) (compensating balance requirements).

Two cases similar to the case at bar have been filed in Colorado, *Copeland v. MBNA America, N.A.*, No. 92-CV-3909 (Denver Dist. Ct. July 9, 1993) and *Stoorman v. Greenwood Trust Co.*, No. 92 CV 1789 (Denver Dist. Ct. Feb. 4, 1993). Both cases were dismissed on motions of the Defendants.

The Defendant's argument for an expansive view of the term interest is persuasive not only because of the wealth of case law supporting this position, but also

because of the reasoning used for this interpretation. This reasoning is most clearly articulated in *Fisher*, which states that § 85 of the National Bank Act

> was designed by Congress to place national banks on a plane of at least competitive equality with other lenders in the respective states, and, indeed to give to national banks a possible advantage over state banks in the field of interest rates. . . . This most favored lender doctrine was recognized by the Supreme Court in *Tiffany v. National Bank of Missouri*, 18 Wall. (85 U.S.) 409, 21 L.Ed. 862 (1873)."

Fisher at 259. This competitive equality or possible advantage is effectuated by the expansive interpretation of "interest."

With the term interest defined and the legislative intent considered, the question of whether Colorado law is preempted becomes rather simple. The Colorado Supreme Court recently gave a detailed analysis of preemption in *Banner Advertising, Inc. v. People of the City of Boulder*, No. 92SC796 (Colo. February 14, 1994). In *Banner*, the Court indicated that "preemption is fundamentally a question of congressional intent." A state statute may be construed as preempted under three circumstances: first, when the intent is explicitly stated in the statute; second, when preemption may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for States to supplement it; and third, when state law conflicts with federal law. *Banner* at 8.

It is the third type of preemption that is applicable in this case. This type of preemption is "implicated when it

is impossible for a private party to simultaneously comply with both state and federal laws, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Banner* at 8. The Colorado law does not directly conflict with the federal law in that Citibank can comply with both laws by not charging delinquency fees. The Colorado law does obstruct the purposes and objectives of the federal law, and as such § 85 of the National Bank Act is construed to preempt C.R.S. § 5-3-203(5)(a).

The Congressional intent to create a national banking system was recognized in *Marquette*. The "purposes and objectives" of guaranteeing national banks competitive equality with or a possible advantage over local banks in terms of interest were discussed in *Fisher*. Arguably, the Colorado law limits the interest that can be charged by national banks in the state by prohibiting late fees. By doing so, the Colorado law interferes with and is an "obstacle to the accomplishment and execution of the full purposes and objectives" of the National Bank Act.

The Court **GRANTS** the Defendant's Motion for Summary Judgment on its Counterclaim for Declaratory Relief. The Court **DENIES** the Plaintiff's Motion for Summary Judgment as to her First and Second Claims for Relief – the Consumer Credit Code Claims. C.R.S. § 5-3-203(5)(a), as applied, is **PREEMPTED** by § 85 of the National Bank Act. 12 U.S.C. § 85. The Defendant may and at all times was allowed to charge delinquency fees in Colorado.

JUDGMENT IS ENTERED FOR THE DEFENDANT, CITIBANK (SOUTH DAKOTA), N.A., AND AGAINST THE PLAINTIFF, SUSAN L. RICHARDSON, ON THE DEFENDANT'S COUNTERCLAIM.

Based on the above ruling, the Court *sua sponte* Orders all Plaintiff's claims **DISMISSED WITH PREJUDICE.**

DATE: March 21, 1994

BY THE COURT:

/s/ Lynne M. Hufnagel
Lynne M. Hufnagel
District Court Judge

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DISTRICT COURT, DENVER COUNTY,
STATE OF COLORADO

Case No. '92 CV 1460, Courtroom _____

CLASS ACTION COMPLAINT

SUSAN L. RICHARDSON, on behalf of herself and all others similarly situated,

Plaintiff,

v.

CITIBANK (South Dakota), N.A., and RONALD WILLIAMSON, C.O., Citibank (South Dakota), N.A.,

Defendants.

Plaintiff, by her counsel, alleges upon knowledge with respect to herself and her own acts, and upon information and belief as to all other matters, based in part on the investigation of counsel and publically available reports and statements as follows:

NATURE OF THE CASE

1. This is a consumer class action, pursuant to the Colorado Consumer Credit Code and the common law, brought on behalf of all residents of Colorado who are or have been holders of a Citibank Classic Credit Card issued by Defendant Citibank (South Dakota), N.A., and who have been or might be in the future charged delinquency or late payment charges for monthly installment

payments which were not paid when due. Plaintiff, on behalf of the class, seeks refund of all delinquency or late payment fees charged or collected by the Defendant, all interest charged on such late payment fees, and a penalty in an amount to be determined by the Court which will not exceed the greater of the credit service charge, or ten (10) times the amount of the excess charge pursuant to C.R.S. §5-5-202(4), given that Citibank has made late charges in deliberate violation of, or in reckless disregard of the laws of the State of Colorado, and for an injunction prohibiting Defendants from continuing to contract for and collect late charges from residents of Colorado in violation of applicable Colorado law.

JURISDICTION

2. Jurisdiction is proper in this Court because the claim arises solely under Colorado statutory and common law.

PARTIES

3. Plaintiff Susan L. Richardson currently resides at: 3400 Belcaro Drive, Denver, Colorado 80209 and has been a Colorado resident since April of 1989. Defendants have charged Plaintiff's Citibank Classic credit card account, and thereby have increased her unpaid balance in the account by approximately $60.00 in late charges or delinquency fees.

4. Defendant Citibank (South Dakota), N.A., ("Citibank") is a nationally chartered banking association located at Post Office Box 6000, Souix [sic] Falls, South

Dakota. Citibank is a wholly owned subsidiary of Citicorp, Inc., which is a publically owned bank and thrift holding company incorporated in Delaware and headquartered in New York, New York. Citibank, with the assistance and under the direction of the other Defendants, and others currently unknown to Plaintiff, actively solicits Colorado consumers through direct mailings, "take one" advertisements, and multi-media advertising to apply for and accept credit cards issued by Citibank within Colorado.

5. Defendant Ronald Williamson ("Williamson") is and has been President and Chief Executive Officer of Citibank, located at Post Office Box 6000, Souix [sic] Falls, South Dakota. As such, he signed the cardholder agreements mailed by Citibank to residents of Colorado at their Colorado addresses, including the agreements received by the Plaintiff. By reason of his senior management position, and his position of authority, Defendant Williamson was able to and did control the contents and disclosures of the various application forms, advertisements, cardholder agreements, monthly billing statements, and correspondence transmitted by Defendants into Colorado and directed at residents of Colorado, including Plaintiff and members of the class.

6. Defendant Williamson had the power and influence, and exercised such power and influence, to cause Citibank (South Dakota) to engage in the illegal practices complained of herein. Defendant Williamson knew or recklessly ignored the facts that Colorado law prohibits Citibank from charging and collecting the late fees complained of herein, but Defendant Williamson concealed such material information from Colorado consumers.

CLASS ACTION ALLEGATIONS

7. Plaintiff brings this case as a class action pursuant to Rule 23 of the Colorado Rules of Civil Procedure on behalf of a class (the "Class") consisting of all the residents of Colorado who are or have been holders of a Citibank Classic credit card issued by Defendant Citibank (South Dakota), N.A., and have been charged or may be charged illegally a delinquency fee or late charge.

8. On information and belief, there are more than ten thousand persons who are or have been holders of the Citibank Classic credit card issued while they were residents of Colorado. A substantial number of such persons have been charged a late charge by Defendants. Although the exact number of such persons is unknown to Plaintiff at this time, Defendants' record systems contain information on the identities and location of all such cardholders as well as the amounts of the illegal charges imposed upon or collected from all such persons. Because Defendants have exclusive control of such information, Plaintiff reserves the right to amend her allegations following completion of discovery of Defendants. Given the nature and extent of Defendants' solicitation and activity in Colorado, it is clear that the members of the Class are so numerous that joinder of all members is impractical.

9. Plaintiff's claims are typical of the claims of the members of the Class since Plaintiff and the other members of the Class sustained damages arising out of the Defendants' wrongful conduct and violation of Colorado law.

10. Plaintiff will fairly and adequately protect the interest of the members of the Class and has retained

counsel competent and experienced in class and consumer litigation.

11. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impractical. Furthermore, since the damages suffered by individual class members may be relatively small, the expense and burden of individual litigation makes it impractical for the class members to individually seek redress for the wrongs done to them. Plaintiff envisions no difficulty in the management of this action as a Class action.

12. Common questions of law and fact exist as to all members of the Class, and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact of the Class are:

a. Whether Colorado banking, consumer protection, usury, and common laws have been and continue to be violated by Defendants' acts as alleged herein;

b. Whether Defendants participated in the plan, scheme and course of conduct complained of herein; and

c. Whether the members of the Class sustained damages and, if so, what is the proper measure thereof.

FACTUAL BACKGROUND

13. Sometime in 1986, Plaintiff Richardson was solicited in Denver, Colorado by an individual who was systematically soliciting University of Denver students to become Citibank Classic cardholders. Thereafter she

applied for and received Citibank Classic Visa credit card mailed to her at her Colorado residence by Defendants. Plaintiff did not receive her card member agreement until she received the actual credit card. Neither the application nor the card member agreement disclosed that Colorado law prohibits and limits the charging of late fees for past installments or that the law of Plaintiff's resident state, Colorado, was different from the law of South Dakota, the state in which Defendants were located. After receiving the credit card, Plaintiff used the credit card to purchase goods and services in Colorado, primarily for personal, family and household purposes and thereby accepted the credit card in Colorado within the meaning of C.R.S. §5-1-201.

14. Plaintiff Richardson did not pay her monthly minimum installment due on her account as stated on her monthly billing statements. As a result, her succeeding monthly billing statements, which were mailed to her in Colorado by Defendants, reflected imposition of at least four separate "late charges" of $15 each. These late fee charges were added to the unpaid balance reflected on Plaintiff's monthly billing statements, and interest was charged on the resulting balance.

15. Plaintiff has since made payments to Defendants to reduce her unpaid balance, which includes paying both the late fee charges and interest calculated thereon.

16. Defendants issue the Citibank Classic card, pursuant to Card Member Agreements in the form attached to this Complaint as Exhibit A, to customers nation-wide, including to over ten thousand residents of Colorado. For at least the past three years, Defendants have issued such

cards at an annual percentage rate finance charge of 19.8%. Pursuant to the card member agreement, Defendants also impose a separate $10 late payment charge if the minimum payment due is not paid within 25 days after the payment due date in any one month.[1] According to the Card Member Agreement, failure to make at least the minimum payment due by the due date in any month puts the customer in default and triggers the late payment charge.

17. Defendants actively solicit card member applications throughout Colorado and nationwide through direct mail, telemarketing, and "take-one" applications. Defendants also conduct extensive multi-media advertising nationwide, which includes advertising in Colorado, newspapers, television, radio, billboards and advertising panels.

18. Defendants do not include late charges in the computation or disclosure of annual percentage rate in the card member agreement, monthly billing statements, application forms, or national advertising. However, Defendants do separately identify the late payment charges in the card member agreement, and do separately identify finance charges and late payments on the monthly billing statement as "finance charges" and "late charges".

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[1] This late charge was unilaterally increased to $15 by Defendant sometime after 1990 without notice to Plaintiff or other members of the Class.

19. A Citibank Classic finance charge is imposed on unpaid balances which include unpaid late charges. Multiple late fees are assessed in successive billing cycles for continuing unpaid balances past the 25-day period. A monthly finance charge (which is equal to the annual percentage rate divided by 12) is then imposed on the unpaid balances, including multiple late charges.

20. The late charges collected by Defendants are not components of the finance charges, and are not described as such in the card member agreement or in the monthly billing statements. The payment of a late charge does not, in itself, influence Defendants' decision as to whether to extend further credit or suspend the credit privileges. The purposes of Defendants' late charges are to deter default and to provide a source of revenue in addition to interest charges. The late charges are not stated in terms of percentages, and are not advertised by Defendants for the purposes of enabling consumers to compare such charges with those of Defendants' competitors.

21. Defendants send thousands of Citibank Classic cardholders their monthly statements to Colorado addresses. It is on these monthly statements that Colorado cardholders, including Plaintiff, have received notice of the assessment of late fee charges. Card member payments to Defendants are then made by a check drawn on the card member's banking account, typically in Colorado. Plaintiff's payments, as with typical payments of other Citibank Classic cardholders in Colorado, were drawn on a Colorado bank account.

22. Citibank Classic cardholders may use their cards to make a purchase or to obtain cash at the location of

participating merchants or at automatic teller machines (ATM) in Colorado.

23. Defendants not only actively solicit Colorado consumers within Colorado to become Citibank cardholders, but they also solicit directly and indirectly through the activities of VISA, MASTERCARD, and other bank card consortia, Colorado merchants and cash clearing systems, such as CIRRUS, to accept and honor the Citibank credit cards.

24. One of the proported advantages of the Citibank Classic cards that is advertised by the Defendants is that a cardholder may have a right not to pay the remaining amount due for the property or services purchased with the credit card if a problem arises with the quality of the property or services purchased from a merchant. Pursuant to the card member agreement, however, this right is limited to purchases made in the cardholder's home state, or, if not within that state, within 100 miles of the cardholder's address.

25. On information and belief, out-of-state banks other than Defendants that solicit customers and issue VISA or MASTERCARD credit cards in Colorado disclose on their application forms that late fee charges will not be charged to residents of Colorado and several other states. On information and belief, the fact that late fees may not be charged to Colorado residents by either out-of-state or in-state banks has not resulted in different interest rates being advertised or provided to Colorado consumers by any credit card issuers. Out-of-state banks issuing credit cards to Colorado residents have not been dissuaded or

burdened from soliciting such business by the fact that Colorado law prohibits them from charging late fees.

26. To the extent Defendants must institute collection efforts against a past-due account of a cardholder residing in Colorado, Defendants have typically instituted suit and legal proceedings in the courts of Colorado. Defendants have also used and benefited from the judgment execution laws of the State of Colorado.

LEGAL BACKGROUND

27. Colorado law prohibits lender credit card issuers from charging customers any "delinquency fees" in addition to advertised interest rate service charges. C.R.S. §5-3-203(5)(a) (amended by-laws, 1991, H.D. 91-1212 §1, effective July 1, 1991). With respect to credit cards issued by out-of-state banks and finance agencies, Colorado law makes it clear that it controls and applies to any contract accepted by a Colorado resident while he or she is located in Colorado. C.R.S. §5-1-201. The Colorado Legislature thus has expressed this State's strong and overriding interest in regulating all credit extension practices that reach inside the borders of the state.

28. Although Colorado Citibank cardholders signed an agreement specifying the law of South Dakota shall apply to the agreement, C.R.S. §5-1-201(9)(a) provides that an agreement by a debtor is invalid, with respect to a consumer loan lender credit cards such as the credit cards issued by Citibank are considered consumer loans under C.R.S. §5-3-104) that the law of another state shall apply. Therefore, Colorado law, not South Dakota law, applies with respect to the credit card agreements.

29. C.R.S. §5-1-201(12)(b) provides that "a lender, whether licensed or not, may not contract for or receive charges exceeding those permitted by this Code for supervised lenders." Citibank is a supervised lender, C.R.S. §5-3-501(2), as it makes supervised loans defined by C.R.S. §5-3-501(1), i.e., consumer loans in which the loan finance charge exceeds twelve (12) percent per year.

30. With respect to a supervised loan, lenders may contract for and receive a loan finance charge not exceeding that permitted by C.R.S. §5-3-508(3)(a). Under the Colorado Consumer Credit Code, such banks, finance agencies and retailers may charge an interest rate on outstanding credit card balances not to exceed twenty-one percent (21%) per year.

31. A separate section of the Colorado Consumer Credit Code §5-3-203, prohibits such banks and finance agencies from charging any late fees or delinquent fees on credit cards accounts:

> (5)(a) Except as provided in paragraph (b) of this subsection (5), with respect to a consumer loan, refinancing, or consolidation which is not precomputed, including a revolving loan account, the parties may contract for a delinquency charge on any instalment [sic] not paid in full within ten days after its scheduled due date in an amount not exceeding the lesser of five percent of the unpaid amount of the instalment [sic] or ten dollars; **except that the provisions of this paragraph (a) shall not apply to a revolving loan account for which a lender credit card is issued by the lender to the debtor.**

(Emphasis supplied). Thus banks, finance agencies, and retailers soliciting Colorado residents or operating within Colorado may charge a maximum annual percentage interest rate on the unpaid balances of 21%, but may not change any late fee or delinquency fee when the cardholder is late or even misses a monthly payment. Of course, interest continues to accrue on such unpaid balances.

32. Although Colorado law clearly limits the interest rate that Colorado banks and finance agencies may charge their customers, it does not limit the interest rate out-of-state banks may charge even where the consumers are residents of Colorado. This is because federal law specifically addresses "interest rates" charged by national or state chartered banks. Under the National Bank Act, 12 U.S.C. §85, out-of-state banks are permitted to charge their customers any interest rate that is permitted by the law of the state in which the bank is located. Taking advantage of this law to attract the business of credit card issues in the early 1980's, several states – most notably Delaware and South Dakota – have virtually eliminated interest rate and other usuary [sic] restrictions, encouraging banks (such as Citibank) to locate there.

33. Although federal law permits out-of-state banks such as Defendants to export to Colorado and other states interest rates permitted in their state of location, it does not permit them to export late fees or any other charges, fees or terms to a borrower state. Yet, as evidenced by this case, state and national banks located in deregulated states, including Defendants herein, have knowingly and repeatedly misused and misconstrued federal authority as a pretext and vehicle to evade state laws permitting

non-interest rate charges such as late fees or other substantive requirements which are specifically addressed by Colorado law.

34. In contrast with states like Delaware and South Dakota, Colorado has sought to preserve its consumer protection and usuary [sic] laws. Colorado has not forsaken such protection simply to lure certain businesses to set up operations within the state. Defendants' conscious disregard of Colorado laws has undermined the carefully crafted regulatory scheme of Colorado, and has perverted the balance between the federal interest and permitting a national market for consumer interest rates and the state interest in protecting consumers against late fees, hidden charges and overreaching credit collection practices.

35. By knowingly contracting for and charging Plaintiff and members of Class late fees or delinquency charges that are clearly prohibited by Colorado law, Defendants have willfully violated the law.

FIRST CLAIM FOR RELIEF

Pursuant to C.R.S. §5-5-202

36. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 35 as if fully set forth herein.

37. Defendants have willfully failed to comply with the provisions of the Colorado Consumer Credit Code (the "Code") as they have knowingly contracted for, charged and collected from Plaintiff, and the members of the Class, late fees and expenses prohibited under C.R.S. §5-3-203.

38. Pursuant to C.R.S. §5-5-202 Plaintiff and members of the Class are entitled to reimbursement of all late fees contracted for, charged and collected by Defendants. Furthermore, if the creditor, Citibank, has made an excess charge in deliberate violation of or in reckless disregard of this Code, a penalty may be recovered even though the creditor has refunded the excess charge. The penalty a person may recover is the amount determined by a court which shall not exceed the greater of either the amount of the credit service charge, or ten times the amount of the excess charge. C.R.S. §5-5-202(4).

39. Accordingly, Defendants are liable to Plaintiff and the members of the Class for substantial actual damages, the precise amount which shall be determined after discovery of Defendants. Moreover, given the blatant and persistent nature of Defendants' misconduct, Plaintiff and other members of the Class should be awarded ten times the amount of the excess charge.

SECOND CLAIM FOR RELIEF

Pursuant to C.R.S. §5-3-203(5)(a)

40. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 39 as if fully set forth herein.

41. Pursuant to C.R.S. §5-3-203(5)(a), Defendants are prohibited from soliciting, contracting for, billing and continuing to collect from Colorado consumers, including Plaintiff and members of the Class, any late fees or delinquency charges on past installments. Upon information

and belief, Defendants are continuing, and intend to continue to solicit, contract for, bill and collect late fees or delinquency charges.

42. Continuation by Defendants of their illegal practices will irreparably harm Plaintiff and members of the Class, as it will directly result in negative information being reported by Defendants to credit bureaus and credit reporting agencies. The reporting of such negative and legally incorrect information will constitute credit libel and will prevent Plaintiff and other members of the Class from obtaining credit from other sources or from obtaining credit on terms as favorable as those available to persons whose credit reports lack the negative information communicated by Defendants.

43. Plaintiff and other members of the Class are without an adequate remedy at law because it will be difficult, if not impossible, to prove the level of impact attributable to Defendants transmission of negative credit information to credit reporting agencies on the decisions of other financial agencies to extend credit to Plaintiff and other members of the Class.

44. Accordingly, Defendant should be preliminarily and permanently enjoined and prohibited from continuing their illegal practices. Moreover, Defendants should be enjoined from communicating negative payment information about the accounts of Plaintiff and the members of the Class to any credit bureau or to any credit reporting agency to the extent that such information is, in whole or in part, related to the non-payment of an illegally charged late payment fee.

THIRD CLAIM FOR RELIEF

Unjust Enrichment

45. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 39 as if fully set forth herein.

46. By reason of the misconduct alleged above, Defendants have been unjustly enriched at the expense of Plaintiff and members of the Class.

47. The late fee charges imposed by Defendants were not and are not reasonably related to any administrative costs to Defendants that are not already inherent in the establishment, investigation and maintenance of the credit extended to consumers and thus, are already accounted for in the interests rate charged under Defendants 19.8% annual percentage rate finance charge.

48. Accordingly, Defendants are liable to the Plaintiff and the members of the Class in the amount of the unjust enrichment to Defendants from imposition and collection of such late fees, plus interest on such amount.

FOURTH CLAIM FOR RELIEF

Violations of the Colorado Consumer Protection Code

49. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 48 as if fully set forth herein.

50. By engaging in misconduct alleged above, Defendants have employed unfair methods of competition and unfair or deceptive acts or practices in the conduct of the trade or commerce of credit extension. In

particular, Defendants' acts and practices constitute fraudulent conduct which creates, was designed to create, and will continue to create a likelihood of confusion or misunderstanding about the propriety of late charges imposed on members of the Class, including the liability or not of such members to pay late fees not permitted by Colorado law, but nonetheless charged the members credit card accounts.

51. As a direct and proximate result of Defendants' employment or use of these unfair methods of competition unfair or deceptive acts or practices, Plaintiff and the other members of the Class have sustained ascertainable damages in as much as they have paid late fees to Defendants together with interest calculated on the late fees that were added to unpaid balances of the accounts of Plaintiff and other members of the Class.

52. Pursuant to C.R.S. §6-1-113, Plaintiff and other members of the Class are entitled to recover the excess amount they paid or if the creditor has made the excess charge in deliberate violation of Colorado law, three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater. The precise amount of such damages in the aggregate will be determined after discovery of Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for judgment as follows:

1. Declaring this action to be a proper Class Action pursuant to Rule 23 of the Colorado Rules of

Civil Procedure, and that Plaintiff is a proper class representative of the Class;

2. Awarding Plaintiff and the other members of the Class compensatory damages as a result of the wrongs alleged in the First, Third and Fourth Claims for Relief;

3. Awarding Plaintiff and other members of the Class ten times the amount of the excess charged, as a result of the wrongs alleged in the First Claim for Relief;

4. Awarding Plaintiff and other members of the Class three times the amount of actual damages sustained or two hundred fifty dollars, whichever is greater, as a result of the wrongs alleged in the Fourth Claim for Relief.

5. A preliminary and permanent injunction enjoining Defendants from continuing their illegal practices and from communicating adverse information related to late fees or delinquency charges to any creditor bureaus or credit reporting agencies requesting reports about Plaintiff or any member of the Class as prayed for in the Second Claim for Relief.

6. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest as a result of the wrongs complained of herein;

7. Awarding Plaintiff and other members of the Class the costs and expenses in this litigation, including reasonable attorneys' fees and expert fees and other costs and disbursements; and

8. Granting Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury of all issues so triable.

Dated at Denver, Colorado this 28th day of February, 1992.

Respectfully submitted,

BADER & VILLANUEVA, P.C.

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ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:

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Denver, Colorado 80209

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 92 CV 1460, Courtroom 9

FIRST AMENDMENT TO COMPLAINT

SUSAN L. RICHARDSON, on behalf of herself and all others similarly situated,

Plaintiff,

v.

CITIBANK (South Dakota), N.A.,

Defendant.

Pursuant to the Court's Order of September 11, 1992, Plaintiff provides this First Amendment to the Complaint adding a claim for declaratory relief.

[new] **FIFTH CLAIM OF RELIEF**
Declaratory Judgment

53. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 52 as if fully set forth herein.

54. With regard to Defendant's practice of charging late fees, as set forth more fully in the proceeding paragraphs, the parties have a substantial controversy between them and adverse legal interests.

55. There is sufficient immediacy because Defendant has charged and Plaintiff has paid late fees. Additionally, Defendant is continuing its practice of charging late fees.

56. Declaratory judgment will serve a useful purpose in clarifying and settling the legal questions at issue and will terminate and afford relief from uncertainty, insecurity and controversy giving rise to this proceeding.

57. Pursuant to C.R.S. § 13-51-101 *et seq.* and C.R.C.P. 57, Plaintiff seeks declaratory relief.

[amended] **PRAYER FOR RELIEF**

8. Declaring that Defendant's practice of charging credit card late fees violates the Colorado Consumer Credit Code.

9. Declaring that the South Dakota choice of law provision in Defendant's cardmember agreement does not permit Defendant to violate the Colorado Consumer Credit Code.

10. Declaring that the National Bank Act does not preempt enforcement of Colorado Consumer laws prohibiting contractual penalties in consumer credit agreements.

11. Granting Plaintiff and the members of the Class such other and further relief as may be just and proper under the circumstances.

Dated this 18th day of September, 1992.

Respectfully submitted,

BADER & VILLANUEVA, P.C.

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing FIRST AMENDMENT TO COMPLAINT was mailed to the following by placing the same in the United States mail, postage prepaid, this 18th day of September, 1992:

William Bianco, Esquire
Davis Graham & Stubbs
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Denver, Colorado 80202

/s/ Marlynn Newcomb

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

(2)

No. 95-1493

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SUSAN L. RICHARDSON,
Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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12 PP

QUESTION PRESENTED

Of the three questions listed by petitioner, the only one actually presented in this case is the third question listed in the petition, which respondent would suggest rephrasing as follows:

> Does the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, include charges by a national bank for the failure of a borrower to make timely payment of amounts due on credit card accounts?

Petitioner's first two questions are not presented. The Colorado Supreme Court did not hold, and no party contends, that the South Dakota legislature has the power to define the term "interest" as used in section 85 of the National Bank Act, 12 U.S.C. § 85. *See* discussion *infra* pp. 5-6.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Citibank (South Dakota), N.A. states that it is a wholly owned subsidiary of Citicorp Holdings, Inc., which is a wholly owned subsidiary of Citicorp.

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IN THE

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OCTOBER TERM, 1995

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SUSAN L. RICHARDSON,
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Respondent.

On Petition for a Writ of Certiorari to the Colorado Supreme Court

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RESPONDENT'S MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Colorado Supreme Court is reported as *Richardson v. Citibank (South Dakota), N.A.*, 908 P.2d 532 (Colo. 1995) (Petitioner's Appendix ("Pet. App.") at 1-5). The order and opinion of the trial court (Pet. App. at 9-22) are not reported.

JURISDICTION

The Colorado Supreme Court entered its judgment on December 18, 1995. The petition was filed on March 18,

1996, and docketed on March 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is set out at page 2 of the petition.

Section 85 of the National Bank Act, 12 U.S.C. § 85, is set out, in relevant part, at page 3 of the petition.

Section 86 of the National Bank Act, 12 U.S.C. § 86, is set out, in relevant part, at page 3 of the petition.

Section 54-3-1 of the South Dakota Codified Laws is set out at page 4 of the petition.

Section 54-3-1.1 of the South Dakota Codified Laws is set out at pages 4-5 of the petition.

The Colorado Uniform Consumer Credit Code provision that governs late charges, Colo. Rev. Stat. § 5-3-203 (1992), is set out at page 4 of the petition.

STATEMENT

Introduction

The question presented by this case is already pending before the Court in *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (No. 95-860), which has been fully briefed and is scheduled for argument on April 24, 1996. There is thus no reason for the Court to grant this petition now; the case can simply be held for the decision in *Smiley*.

This is one of many purported class action lawsuits filed in courts around the country against respondent Citibank (South Dakota), N.A. ("Citibank") and other banks challenging late payment fees charged pursuant to credit card agreements entered into with credit cardholders. These lawsuits have led to a conflict between the

highest courts of different states on an important question of federal law: whether the term "interest" in section 85 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees. The decision of the Colorado Supreme Court (Mullarkey, J.) from which petitioner seeks review is consistent with recent decisions of the California Supreme Court, *Smiley, supra*, and the United States Court of Appeals for the First Circuit, *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993). Those decisions are also in harmony with the interpretation of section 85 on this point by the Office of the Comptroller of the Currency (the "OCC"), which charters and supervises national banks, including Citibank. A recent decision by the New Jersey Supreme Court, however, directly conflicts with this authority. *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 668 A.2d 1036, *petition for cert. filed*, 64 U.S.L.W. 3439 (U.S. Dec. 21, 1995) (No. 95-991).

The question of federal law on which these courts differ is very important and, for that reason, Citibank supported the petition for certiorari in the *Smiley* case and filed its own petition for certiorari in the *Sherman* case.

Background

Citibank is a national banking association chartered by the OCC, a division of the Treasury Department. Citibank is located in Sioux Falls, South Dakota. It issues Visa, MasterCard, and other credit cards to customers nationwide, extends credit pursuant to the agreements covering such cards, and collects the charges that cardholders have contracted to pay. (*See* Pet. App. at 24-25.) Citibank's credit card agreements generally provide for both "finance charges" on certain outstanding balances and "late payment charges" if a cardholder does not make a required minimum payment by a specified date. (*Id.* at 28-29.)

On February 28, 1992, petitioner filed her complaint as a purported class action in the District Court, Denver County, State of Colorado, challenging Citibank's late payment charges. She alleged that she was a Colorado resident and that Citibank had assessed late payment charges on her VISA credit card account. (*Id.* at 24.) Such charges were consistent with the express terms of her card agreement with Citibank and were permitted under the law of South Dakota, Citibank's home state. Petitioner alleged, however, that such fees were impermissible under Colorado law. (*Id.* at 32-35.)

How the Federal Question Was Presented and Resolved Below

Petitioner's claim was predicated entirely on her contention that late payment charges assessed by Citibank on credit card accounts of Colorado residents violated Colorado law. (*Id.* at 35-39.) On September 18, 1992, Citibank moved the District Court for summary judgment as to all claims set forth in the Complaint. The basis for Citibank's motion was that, under section 85 of the National Bank Act, 12 U.S.C. § 85, Citibank is authorized to charge the "interest" allowed under the laws of its home state, South Dakota; that the term "interest" as used in section 85 includes Citibank's late payment charges; and that, as this Court held in *Marquette National Bank v. First of Omaha Service Corp.*, 439 U.S. 299, 308 (1978), section 85 preempts any conflicting state law.

On March 21, 1994, the District Court granted Citibank's motion. (Pet. App. at 9-22.) While petitioner's appeal to the Colorado Court of Appeals was pending, petitioner and Citibank jointly filed for a writ of certiorari to the Colorado Supreme Court. On January 30, 1995, the Colorado Supreme Court granted review (*id.* at 6-8), and on December 18, 1995, the Colorado Supreme Court affirmed the judgment of the District Court dismissing petitioner's claims (*id.* at 1-5).

The Colorado Supreme Court's decision rested on its recent opinion in *Copeland v. MBNA America Bank, N.A.*, 907 P.2d 87 (Colo.), *petition for cert. filed*, 64 U.S.L.W. 3469 (U.S. Dec. 28, 1995) (No. 95-1056). Based on a thorough review of the language, legislative history, purpose, and prior judicial and administrative interpretations of section 85, *id.* at 90-94, the court in *Copeland* had concluded that:

> as a matter of federal law, a late payment fee imposed on a customer's credit card account is a form of "interest" under section 85 of the NBA. [Therefore,] federal law authorized a national bank located in Delaware to assess a fifteen dollar late payment fee, allowed under Delaware law [the bank's home state], to the credit card account of a Colorado resident despite the fact that a Colorado consumer protection law prohibited such fees.

(Pet. App. at 4-5 (citing *Copeland*) (footnote omitted).) Consistently with *Copeland*, the Colorado Supreme Court concluded that "because Citibank is a national bank located in South Dakota, and South Dakota law permits the imposition of a late payment fee, Citibank can charge Richardson a late payment fee despite the fact that a Colorado consumer protection law prohibited such fees." (*Id.* at 5.)

ARGUMENT

I. THE SOLE QUESTION PRESENTED IS WHETHER "INTEREST," AS USED IN SECTION 85, INCLUDES CREDIT CARD LATE PAYMENT CHARGES.

The sole question properly presented for review in this case is whether "interest," as used in section 85, includes late payment fees on credit card accounts. If so, then any Colorado law purporting to impose conflicting limits on Citibank's late payment fees is preempted. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 308, 318 n.31 (1978).

Petitioner has listed two other questions (questions 1 and 2 in the petition) that are not properly presented in this case. Contrary to the assumption in petitioner's first question, the Colorado Supreme Court did not hold that the term "interest" in section 85 includes late payment charges because the word "interest" is used that way in South Dakota law. Rather, the court unequivocally held that late payment fees are "interest" under section 85 "as a matter of federal law." (Pet. App. at 4.) For that reason, the assumption in petitioner's second question presented that the Colorado Supreme Court held that Congress delegated to South Dakota the power to define "interest" is also incorrect.

II. THE QUESTION PRESENTED IN THIS CASE IS ALREADY BEFORE THE COURT IN *SMILEY*.

There is no reason for the Court to grant this petition because the issue presented is before the Court in a pending case. *Smiley v. Citibank (South Dakota) N.A.*, 11 Cal. 4th 138, 900 P.2d 690, 44 Cal. Rptr. 2d 441 (1995), *cert. granted*, 116 S. Ct. 806 (1996) (No. 95-860).

As petitioner acknowledges (Petition at 1), there is no relevant distinction between this case and *Smiley*. Each case involves a claim that Citibank's late payment charges were not permissible under the law of a plaintiff's home state (in *Smiley*, California law; in this case, Colorado law). In each case, Citibank sought judgment as a matter of law on the ground that section 85 of the National Bank Act, 12 U.S.C. § 85, which authorizes a national bank to charge "interest" to borrowers nationwide at the rates allowed by the bank's home state, *Marquette*, 439 U.S. at 308, preempted the state laws on which the claims were based. In each case, the state court granted Citibank's motion on the ground that "interest," as that term is used in section 85, includes late payment charges and, therefore, that the plaintiff's claims were preempted by

that statute. (Pet. App. at 5; *Smiley*, 11 Cal. 4th at 163-64, 900 P.2d at 707, 44 Cal. Rptr. 2d at 458.)

CONCLUSION

For the foregoing reasons, the petition should be held pending the Court's decision in *Smiley*, and then disposed of consistently with that decision.

Respectfully submitted,

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